U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 0 2 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The beneficiary is a dentist who seeks employment with the dental practices of [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner provides a statement and indicates that a brief will be forthcoming within 30 days. To date, more than ten months after the filing of the appeal, the record contains no further substantive submission from the petitioner. The AAO therefore considers the record to be complete as it now stands.

Part 1 of the Form I-140 petition identifies [redacted] as the petitioner. Form G-28, Notice of Entry of Appearance as Attorney or Representative, identifies [redacted]'s attorney of record. Review of the petition form, however, indicates that [redacted] is the petitioner. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Mr. [redacted] rather than any official of Dr. [redacted] practice, electronically signed Part 8 of the Form I-140, "Signature." Thus, Mr. [redacted] and not Dr. [redacted], has taken responsibility for the content of the petition. This will not affect the adjudication of the appeal, because Mr. [redacted]s personally filed the appeal. Furthermore, the petitioner need not be the beneficiary's intending employer. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(1) states that anyone acting in the beneficiary's behalf may be the petitioner. The AAO considers both the petition and the appeal to have been properly filed, albeit by Mr. [redacted] rather than [redacted]. At the same time, because Dr. [redacted] is not an affected party in this proceeding, the AAO will disregard Form G-28, and consider Mr. [redacted] to be self-represented.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the beneficiary qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the beneficiary seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the beneficiary will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the beneficiary's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the beneficiary will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the beneficiary, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given beneficiary seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that beneficiary cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 17, 2010. In a letter accompanying the initial submission, the petitioner stated:

> [The beneficiary] meets the requirements for waiver of the labor certification requirement because of the nature of the job offer and the nature of the work to be performed. [The beneficiary's] unique skills as a Dentist, particularly in the manner in which she treats and educates minority children, teens and young adults in oral hygiene and the importance of dental care as part of an overall approach to a healthy life and lifestyle, substantially outweighs the national interest of protecting US workers through the labor certification process. . . .
>
> [The beneficiary's] contact with these patients is very often their first contact with a Dentist or the first contact after an extended period of dental neglect. . . .
>
> [The beneficiary] also explains the role that diet plays in good dental health and how this relates to one's general health and well being for the long term. Minority patients are far more likely to have diets that are high in sugar which is a major factor in tooth decay as well as obesity and contributes to the increase in the incidence of diabetes in a population which is statistically more likely to develop this disease. . . .
>
> [H]er actions contribute to benefit a growing population of individuals which itself is in the "national interest," through achieving both improvements in dental and general health which serves to lower overall health care costs. In addition, because the dental practice in which she seeks to be employed services a large African-American population, the owner of that practice desires the services of a Dentist who is also an individual "of color" and such a position would not be certifiable by the Department of Labor because of the restrictive requirement.

The initial submission included no evidence except documentation of the beneficiary's dental degree from Tufts University.

On January 12, 2011, the director issued a request for evidence, instructing the petitioner to submit evidence to meet the guidelines set forth in *NYSDOT*. In response, the petitioner stated that the beneficiary "has made application to the U.S. Patent Office . . . for a patent for a 'Tongue Protector

and Method of Using Same.' According to [the beneficiary] her invention significantly eases patient care while also affording protection from accidental injury during the course of various dental procedures." The record shows that the beneficiary filed the provisional application for patent on September 22, 2010, five days after the filing of the Form I-140 petition.

The petitioner also asserted that the beneficiary's "intended employment . . . as a dentist in [redacted] office is intrinsically important to improve dental health in the general population but more specifically to improve dental health in the black community which faces unique problems vis-à-vis dental health." The petitioner submits a copy of a newspaper article discussing statistics relating to dental health in the African-American community. The petitioner also repeats the assertion that labor certification is not a realistic option because it does not take race into account as [redacted] wishes to do in filling the position.

The director denied the petition on March 15, 2011. The director acknowledged the substantial intrinsic merit of dentistry, but observed that intrinsic merit is only one prong of the three-pronged *NYSDOT* test. The director found that the petitioner had not shown the national scope of the beneficiary's intended work, or distinguished the beneficiary from other qualified dentists. Regarding the beneficiary's invention, the director noted that the beneficiary filed the provisional patent application after the petition's filing date. The petitioner must establish that the beneficiary is eligible for the requested benefit at the time of filing the application or petition. *See* 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Furthermore, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *NYSDOT*, 22 I&N Dec. 221 n.7. In this instance, the petitioner has not even shown that the beneficiary holds a patent. The beneficiary filed a provisional patent application, which, according to the filing receipt from the U.S. Patent and Trademark Office, is an administrative placeholder that "will not be examined for patentability" unless the inventor files a patent application within 12 months of the provisional application.

On appeal, the petitioner claims to have established "the beneficiary's individual potential to benefit the country on a 'national impact' level by providing dental services to a patient base[] comprised predominantly of African-American[s] and individuals of [H]ispanic descent." The petitioner does not explain how the beneficiary's work would have a "national impact," when the number of patients she could treat would amount to a negligible fraction of the overall population of the United States. It may well be true that there are ethnic disparities in terms of dental health, but this does not mean that a dentist automatically qualifies for a national interest waiver by promising to focus her efforts on treating patients from disadvantaged populations. The petitioner has not established that the clinical work of one dentist is national in scope.

Also, the AAO acknowledges the petitioner's claim that Dr. [redacted] wishes to hire a dentist of African or Hispanic descent (although the record contains no statement from Dr. [redacted] himself to that effect), and that a potential employer cannot specify a prospective employee's desired race or ethnicity on a labor certification. Nevertheless, the wording of the statute and regulations does not indicate that the unavailability of labor certification automatically results in an exemption from the job offer requirement. Rather, the petitioner must show that a waiver would be in the national interest of the United States. An employer's desire to reject qualified applicants on the basis of race does not meet that standard. The petitioner asserts: "the appearance of even . . . one seemingly qualified candidate could lead to a denial of the labor certification," but fails to explain how that hypothetical outcome would be counter to the national interest. The patients would still have access to the services of a qualified dentist, and the petitioner has submitted nothing to show that the services rendered by the beneficiary are in any way objectively superior to those provided by other qualified dentists.

The petitioner asserts that the beneficiary has "demonstrated her potential impact upon the dental community by continuing to develop new tools and techniques that will benefit the national dental community th[u]s having a national impact." A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). At the time of filing, the petitioner made no representation that the beneficiary would serve the national interest as an inventor of dental devices. The petitioner introduced that claim only in response to the request for evidence. Furthermore, the plural reference to "new tools and techniques" fails to recognize that the petitioner has documented only one new tool. The petitioner has submitted no evidence to show that this tool is in use in any dentist's office. The petitioner has consistently emphasized clinical patient treatment; there is no reason to believe that the beneficiary has devoted, or will devote, substantial time to inventing or improving dental devices.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual beneficiary. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.